Number 765.

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Supreme Court of the United States

October Term, 1942.

RICHARD J. HOPKINS, Judge of The United States District Court for the District of Kansas,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR RE-HEARING.

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We fully appreciate that a review by this court on writ of certiorari is not a matter of right, that the fact that the judgment appealed from may be erroneous is not of prime importance and that the writ will be granted only where there are important reasons therefor. We conceive this to be such a case. This case involves neither money nor property. It involves the independence of United States District Judges in the exercise of the functions required by their judicial office. Not in the history of this country has a district judge been removed

from the performance of his judicial duties by a higher court without written opinion stating the reason therefor. This case raises the question of whether a Federal statute means one thing when invoked by the United States and another when invoked by its adversary.

In this case an affidavit of bias and prejudice was filed by special (local) attorneys for the Department of Justice alleging that petitioner, a United States District Judge, "has a personal bias and prejudice against the United States of America." (R. 6, paragraph numbered 2). The affidavit contains detailed allegations of the "facts and the reasons for the belief that such bias and prejudice exists." (R. 6-17) In this court, the Department of Justice does not attempt to reconcile the numerous decisions of the various Circuit Courts of Appeals with the judgment of the Circuit Court of Appeals for the Tenth Circuit in the present case, as to the legal sufficiency of those reasons. Instead it contends that Section 21 of the Judicial Code entitles a litigant to a change of venue as a matter of right upon the filing of an affidavit, whatever may be the facts and reasons for belief bias and prejudice exists. (Brief of United States in Opposition, pp. 8-16). The various Circuit Courts of Appeals take a different view, holding that the facts and reasons given must be legally sufficient to show such bias and prejudice and that the district judge must determine whether the grounds stated meet that requirement.[1]

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[1] Illustrative cases are:

Craven v. United States, 1 Cir. 22 F. 2d 605, Cert. Den. 276 U. S. 627; *In re Lisman*, 2 Cir. 89 F. 2d 898; *Morse v. Lewis*, 4 Cir., 54 F. 2d 1027, Cert. Den. 286 U. S. 557; *Simmons v. United States*, 89 F. 2d 591; *Refior v. Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, Cert. Den. 316 U. S. 671; *Cuddy v. Otis*, 8 Cir., 33 F. 2d 577; *Price v. Johnston*, 9 Cir., 125 F. 2d 806, Cert. Den. 316 U. S. 677.

In a majority of the cases in which the Circuit Courts of Appeals have laid down the rule that the reasons stated must be legally sufficient the United States has been a party, and the decision as to the meaning of the statute has been in accord with its contention. There are no reported decisions in which the Department of Justice has sought disqualification of a United States District Judge nor in which it has ever contended or conceded that a change of venue is a matter of right upon the filing of the statutory affidavit. The Department of Justice has been successful in establishing a rule of law requiring a litigant to state legally sufficient reasons for belief that a judge is prejudiced. It now contends that this rule applies only to its *adversaries* and that when it desires a change of judge the statute means that a change of venue is a matter of right.

We assume that this peculiar position of the Department of Justice results from a theory that some restraint upon private litigants and their attorneys is necessary to prevent abuse; but that the Department of Justice, taking a more judicial view than the ordinary advocate, will exercise such self-restraint that it will file affidavits in only those cases in which the facts entitle the United States to a change of venue, making unnecessary any restraint upon the Department's demand for a change of judge. Conceding that the Department of Justice and all its attorneys throughout the country are more restrained and judicial than the ordinary attorney, still Congress did not see fit to accord to the United States any greater right to a change of venue than to any other litigant. The Department's theory conflicts with the fundamental concept that ours is a government of laws and not of men.

The theory advanced by the United States in opposition to the granting of the writ would seem to make its allowance imperative, rather than important. If the theory of the United States as to the meaning of Section 21 of the Judicial Code is limited to this case and others in which the United States may seek disqualification of a judge, the granting of the writ is necessary to prevent the judicial branch of the government from being made subservient to the executive. If the theory advanced in the brief of the government has been adopted for all time by the Department of Justice, certiorari is necessary to correct the statement of the rule now followed by all the Circuit Courts of Appeals except the court below. Common honesty requires the United States to confine itself to a single interpretation of the statute whether it or its adversary files an affidavit of prejudice.

The judgment of the Circuit Court of Appeals for the Tenth Circuit is in irreconcilable conflict with the decisions of the other Circuit Courts of Appeals as to the sufficiency of the grounds stated in the affidavit for belief that bias and prejudice exist.

Such affidavits are required to be strictly construed to prevent abuse.[2] The significant word in the statute is the word "personal". By personal prejudice is meant an attitude against a party derived otherwise than through judicial proceedings. No statement of opinion based upon evidence or the proceedings before a judge can

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[2] *Beland v. United States*, 5 Cir., 117 F. 2d 958, Cert. Den. 313 U. S. 585.

form the basis for a charge of personal prejudice against a party as such term is used in the statute.[3] Judicial rulings against the same party in prior trials of like character are not personal prejudice within the meaning of the statute.[4] Reasons or comments of the judge in making judicial rulings do not constitute personal prejudice. Neither irritation upon the part of a judge nor comments upon the judicial tactics of a party or his counsel are sufficient to show personal prejudice, whether such comments are discreet or indiscreet.[5] Impersonal prejudice resulting from a judge's background or experience

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[3] *Craven v. United States*, 1 Cir., 22 F. 2d 605, Cert. Den. 276 U. S. 627, where it was said " 'Personal' is in contract with judicial, it characterizes an attitude of extra-judicial origin, derived non coram judice. 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute." In *Ryan v. United States*, 8 Cir., 99 F. 2d 864, Cert. Den. 306 U. S. 635, it was said: "An opinion based upon evidence cannot be considered a personal prejudice."

[4] *Sacramento Suburban Fruit Lands Co. v. Tatham*, 9 Cir., 40 F. 2d 894, Cert. Den. 282 U. S. 874.

[5] *In Refior v. Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, Cert. Den. 316 U. S. 671, the court said, "Denial of continuance, or the dismissal of a cause of action, coupled with a showing of irritation of the trial judge at the time of the entry of the orders, are not sufficient foundation for the application of the present section of the judicial code, otherwise a litigant could experiment as to the attitude of a trial judge and relitigate issues before another judge, to the annoyance and expense of parties with resulting delay in the disposal of cases." *In re Lisman*, 2 Cir., 89 F. 2d 898, the court said, "There is proof only of indiscreet expressions by the District Judge. These facts do not establish bias or prejudice."

or prejudice against a particular type of litigation is not prejudice within the meaning of the statute.[6]

To reconcile the judgment of the Circuit Court of Appeals as to the sufficiency of the affidavit with the decisions of the Circuit Courts of Appeals for the First, Second, Fifth, Sixth, Eighth and Ninth Circuits cited in footnotes 2 to 6, it was necessary that the affidavit state facts from which any reasonable person would conclude that petitioner was so prejudiced against the United States that he could not afford the United States a fair and impartial trial in any action, without regard to its character, and that this prejudice was not derived from any judicial proceedings before him, but was of non-judicial origin. The affidavit shows the opposite.

Every charge in the affidavit relates to matters arising out of judicial proceedings before the petitioner. In

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[6] In *Price v. Johnston*, 9 Cir., 125 F. 2d 806, Cert. Den. 316 U. S. 677, the court said, "The statute requires that the bias or prejudice be 'personal'. The allegations of the affidavit, as disclosed by the petition for the writ, do not indicate a 'personal' prejudice or bias against the accused, but charge an impersonal prejudice and go to the judge's background and associations rather than his appraisal of the defendant personally. This is not enough under the statute, and the affidavit must be here held to have been insufficient under the law. The plain purpose of the statute 'was to afford a method of relief through which a party to a suit may avoid trial before a judge having a personal bias or prejudice against him or in favor of the opposite party. That sought to be relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against the suitor making the affidavit or in favor of his opponent.' Appellant's allegations reveal that 'the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment on the merits of the controversy. * * * ' *Henry v. Speer*, 5 Cir. 201 F. 869, 871, 872."

most instances the charges relate to matters which arose in the course of judicial proceedings. Every comment upon and criticism of the tactics of the special attorneys for the Department of Justice was a comment upon matters which petitioner observed in the course of judicial proceedings before him and was a statement of conclusions derived from his personal observation of those judicial proceedings.

The conflict between the judgment of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals cited in the footnotes is so obvious that no attempt was made by the United States in its brief to reconcile the decisions. Instead it advanced a new theory. Section 21 of the Judicial Code is an important statute. It is invoked constantly. It has been before the courts in nearly one hundred reported cases and in a far greater number of unreported cases. In a majority of cases in which a change of judge is sought the United States is the adverse party. If a conflict between the judgment of the Circuit Court of Appeals and the decisions of other Circuit Courts of Appeals upon the interpretation of an important Federal statute is a ground for certiorari, the petition should be granted in this case.

Respectfully submitted,

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This petition for rehearing is presented in good faith and not for purposes of delay.

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